1964

Foulger Equipment Co. v. State Tax Commission of Utah et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FOULGER EQUIPMENT COMPANY, a Utah Corporation,
Petitioner,

vs.

STATE TAX COMMISSION OF UTAH and ORVILLE GUNTHER, DONALD T. ADAMS, ARIAS G. BELNAP, and ALLAN M. LIPMAN constituting the members of said commission,
Respondents.

Case No. 10222

RESPONDENTS' BRIEF

PETITION FOR EXTRAORDINARY WRIT

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TABLE OF CONTENTS

	Page
STATEMENT OF THE KIND OF CASE	1
DISPOSITION BEFORE THE TAX COMMISSION	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF FACTS	2
ARGUMENT	4
POINT I.	
SECTION 59-2-14, U.C.A. 1953, IS UNCONSTITUTIONAL AND VOID	4
POINT II.	
SECTION 59-2-14, U.C.A. 1953, IS UNCONSTITUTIONAL AND VOID EVEN IF PASSED IN ANTICIPATION OF A CONSTITUTIONAL AMENDMENT	8
CONCLUSION	11

Authorities Cited

Cases

Busch v. Turner, 26 Cal. 2d 817, 161 P. 2d 456	9
Dickinson v. Porter, 240 Iowa 393, 35' N.W. 2d 66, app. dismissed, 338 U. S. 843, 70 S. Ct. 88, 94 L. Ed. 515	5
Druggan v. Anderson, 269 U. S. 36, 46 S. Ct. 14, 70 L. Ed. 151	9
Judge v. Spencer, 15 Utah 242	6
Matthews v. Quinton, 362 P. 2d 932 (Alaska, 1961)	9
McGrew et al. v. Industrial Commission, 96 Utah 203, 85 P. 2d 608	9
Moon Lake Electric Assoc. v. Utah State Tax Commission, 9 Utah 2d 384	7
Plebst v. Barnwell Drilling Co., 243 La. 874, 148 So. 2d 584	9
Seneca Mining Co. v. Osmun, 82 Mich. 573, 47 N.W. 25	9
State v. Betensen, 14 Utah 2d 121, 378 P. 2d 669	7
State v. Candland, 36 Utah 406, 104 Pac. 285	7
State ex rel. Richards v. Armstrong, 17 Utah 166, 53 Pac. 981	6-7, 8
State v. Salt Lake Co., 96 tUah 464, 85 P. 2d 851	7
State v. Yuma Irr. District, 55 Ariz. 178, 99 P. 2d 704	8

TABLE OF CONTENTS — (Continued)

Page

Constitutional Provisions

Article XIII, Section 2, Utah Constitution 3, 5-6

Article XVI, Utah Constitution 9

Statutes

Utah Code Annotated, 1953

Section 59-2-4 4

Section 59-2-14, et. seq. 1, 3, 10, 11

Substitute S. J. R. 5, Laws of Utah 1963, p. 670 ..... 3, 5, 10

Other Authorities Cited

11 Am. Jur., Sec. 151 9

61 A.L.R. 2d 1065 5

171 A.L.R. 1070 9

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Case No. 10222

RESPONDENTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is an original proceeding in the Supreme Court for an extraordinary writ in the nature of mandamus. The petition for such writ follows denial by the State Tax Commission of a petition and demand of Foulger Equipment for promulgation of regulations to implement Section 59-2-14, et seq., U.C.A. 1953.

DISPOSITION BEFORE THE TAX COMMISSION

In a decision dated August 18, 1964, following a formal hearing before a lawfully constituted quorum of

the State Tax Commission, the petition of Foulger Equipment Company, filed with the Commission on August 10, 1964, was denied.

RELIEF SOUGHT ON APPEAL

Respondents seek a denial of the petition for an extraordinary writ filed by petitioner, Foulger Equipment Company.

STATEMENT OF FACTS

The parties to this action, on August 18, 1964, stipulated through their respective counsel to the following facts:

1. Petitioner, Foulger Equipment Company, is a corporation organized under the laws of Utah, authorized to do business in this state, and doing business at 1361 South Second West, Salt Lake City, Utah.

2. Petitioner's business is the sale and distribution of industrial equipment and machinery.

3. Petitioner's business includes the out-of-state sale of certain items of industrial equipment and machinery after storage in Utah for periods not exceeding twelve months prior to shipment out of the state for such sale.

4. Petitioner, in past years, has been assessed for property of the type described in the previous paragraph and paid tax thereon when such equipment and machin-

ery has been in its possession on January 1st of any given year.

5. The 1963 Utah Legislature passed Substitute Senate Bill 27, now codified as Section 59-2-14, et seq., U.C.A. 1953, which law provides as follows:

> "Tangible personal property being held for sale or processing and which is present in Utah on January 1, m., whether manufactured, processed, produced or otherwise originating within or without the state, which is shipped to final desination outside this state within twelve months following is deemed to have acquired no situs in Utah for ad valorem property tax purposes and shall be exempt.
>
> "The Utah state tax commission shall prescribe rules and regulations under which the foregoing exemption may be claimed and applied.
>
> "The burden of proof shall be upon the taxpayer to establish the exemption."

6. The 1963 Legislature also passed Substitute Senate Joint Resolution No. 5 which will put before the electorate of this state on November 5, 1964, this proposed amendment (by way of addition) to Article XIII, Section 2, of the Constitution of the State of Utah:

> "Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside this state within twelve months may be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state."

7. The State Tax Commission of Utah has promulgated no rules and regulations under which the exemption provided for in Section 59-2-14, et seq., U.C.A. 1953, may be claimed and applied.

8. The State Tax Commission of Utah has been advised by the Utah Attorney general, in Opinion No. 64-035, dated July 23, 1964, that Section 59-2-14, et seq., U.C.A. 1953, is unconstitutional and void and this opinion has been placed into evidence and is by reference made a part of the record of this case.

ARGUMENT

POINT I

SECTION 59-2-14, U.C.A. 1953, IS UNCONSTITUTIONAL AND VOID.

The 1963 Utah Legislature, in an attempt to provide a favorable tax climate for industry and investment, enacted Substitute Senate Bill 27. The bill had the effect of exempting from ad valorem property taxation properties held in the State of Utah but scheduled for shipment to a final destination outside the state within twelve months.

Section 2 of the bill provides that the State Tax Commission is to prescribe rules and regulations under which the exemption established by the above language may be claimed and applied, and Section 4 of the same act repeals the existing 90-day inventory statute provided by Section 59-2-4, U.C.A. 1953.

The legislature thereafter introduced joint resolutions which would provide for the submission to the electorate of a constitutional amendment allowing the above mentioned tax exemption to take effect. The language of Substitute S.J.R. No. 5, in pertinent part, is as follows:

> ". . . Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside this state within twelve months *may* be deemed by law to have acquired no situs in Utah for purposes of ad valorem property taxation, whether manufactured, processed or produced or otherwise originating within or without the state. . . ." (Emphasis added.)

The question presented for review is whether or not Senate Bill 27, as enacted by the Utah Legislature and in effect May 14, 1963, is effective for purposes of granting exemption thereunder, in view of Article XIII, Section 2, of the Utah Constitution.

The power of the State Legislature to exempt from taxation is limited only by federal and state constitutional limitations. *Dickinson v. Porter,* 240 Iowa 393, 35 N.W.2d 66, app. dismissed 338 U.S. 843, 70 S.Ct. 88, 94 L.Ed. 515; Annotation 61 A.L.R.2d 1065. In Utah, the power of the legislature to grant tax exemptions is restricted by the express language of Article XIII, Section 2, of the Utah Constitution which provides in part:

> "All tangible property in this state not exempt under the laws of the United States, or under this constitution, shall be taxed in propor-

tion to its value, to be ascertained as provided by law. . . ."

A similar situation arose in the case of *State ex rel. Richards v. Armstrong,* 17 Utah 166, 53 Pac. 981. In that case, the state, through the State Auditor, brought an original action in the Supreme Court for a writ of prohibition restraining the Board of Equalization of Salt Lake County from granting tax exemptions provided under Section 2579 of the Revised Statutes of Utah allowing that board to remit or abate taxes of insane, idiotic, infirm or indigent persons to an amount not exceeding $10.00 for the current year. The petitioner urged that that statute was unconstitutional and void and that the legislature had no power, under the constitution, to exempt any property from the burdens of taxation, except that expressly exempted by virtue of the constitution. *Judge v. Spencer,* 15 Utah 242, was cited to the effect that the constitutional provision quoted above made manifest:

> ". . . that no power should exist in state government to grant exemption other than those mentioned in the constitution.
>
> "The presumption is that all exemptions intended to be granted were granted in express terms. In such cases the rule of strict construction applies, and, in order to relieve any species of property from its due and just proportion of the burdens of the government, the language relied on as creating the exemption should be so clear as not to admit of reasonable controversy about its meaning, for all doubts must be resolved against the exemption." *Judge v. Spencer,* supra.

The court concluded in holding the statute in question null and void:

> "Where, however, the mind is convinced of the unconstitutionality of the law, the duty which devolves upon the court to declare it so is imperative, even where as in this case, the statute appears to be at consonance with justice and humanity." See also *Moon Lake Electric Co. v. State Taxation Commission,* 9 Utah 2d 384, 345 P.2d 612.

Section 59-2-14, U.C.A. 1953, purporting to establish an exemption from ad valorem taxation, became effective, if at all, 60 days after the close of the 1963 legislative session. This effective date was May 14, 1963. However, as the legislature has no power to grant exemptions other than those mentioned in the constitution, this bill, purporting to establish such exemptions, was void at the time of its enactment. *State ex rel. Richards v. Armstrong,* 17 Utah 166, 53 Pac. 981; *Moon Lake Electric Assoc. v. Utah State Tax Commission,* 9 Utah 2d 384, 345 P.2d 612. See also *State v. Salt Lake Co.,* 96 Utah 464, 85 P.2d 851.

An unconstitutional statute is wholly void and, in legal contemplation, is as inoperative as if it had never been passed. *State v. Candland,* 36 Utah 406, 104 Pac. 285; *State v. Betensen,* 14 Utah 2d 121, 378 P.2d 669.

Thus, it cannot be seriously questioned that Substitute Senate Bill 27 was, at the time of its enactment, ineffective to establish exemptions from taxation.

Where a state constitution limits the power of the legislature to grant tax exemptions, the legislature should not thereafter be permitted to indirectly grant an exemption which it is precluded from granting directly. *State v. Yuma Irr. District*, 55 Ariz. 178, 99 P.2d 704.

Even though the state is to receive certain benefits from the taxpayer or from the granting of the exemption the Utah Legislature, nevertheless, may not commute taxes where an exemption could not lawfully be granted. *State ex rel. Richards v. Armstrong*, 17 Utah 166, 53 Pac. 981.

Here, what the legislature could not do directly, it seeks to do indirectly by declaring that property which will be shipped in interstate commerce within twelve months out of the State of Utah is "deemed to have acquired no situs in Utah for ad valorem property tax purposes. . . ." Certainly, the effect of this language is to provide for tax relief, which violates the constitutional mandate as much as would a direct property tax exemption prohibited by the constitution. The fact remains that the property in question is located in Utah by virtue of its being manufactured, processed or produced in this state, and the legislature may not, by the simple declaring that such property has no situs here, grant an exemption to the property which it would be powerless to do in more forthright language.

POINT II

SECTION 59-2-14, U.C.A. 1953, IS UNCONSTITUTIONAL AND VOID EVEN IF PASSED IN ANTICIPATION OF A CONTITUTIONAL AMENDMENT.

While probably this point is not properly before this Court at this time, the proposition raised by plaintiff is demonstrably false.

Many courts have held that a legislature does have power to enact a statute not authorized by a present constitution where the statute is passed in anticipation of a change in the constitution. Usually, this holding results where the statute itself expressly provides that it shall take effect upon the adoption of the amendment. See *Druggan v. Anderson,* 269 U.S. 36, 46 S.Ct. 14, 70 L.Ed. 151; *Busch v. Turner,* 26 Cal.2d 817, 161 P.2d 456. Additional cases are collected in 171 A.L.R. 1070.

However, an unconstitutional statute is not validated by a subsequent constitutional amendment which does not expressly ratify or confirm the statute, but merely authorizes the enactment of such a statute. *Seneca Mining Co., v. Osmun,* 82 Mich. 573, 47 N.W. 25; *Plebst v. Barnwell Drilling Co.,* 243 La. 874, 148 So.2d 584; *Matthews v. Quinton,* 362 P.2d 932 (Alaska, 1961). See also 11 Am. Jur., Sec. 151.

This conclusion is supported by the Utah case of *McGrew et al. v. Industrial Commission,* 96 Utah 203, 85 P.2d 608. There, the question was raised as to the effect of a house joint resolution proposing an amendment to Article XVI of the Constitution of Utah, authorizing the legislature to provide for the establishment of a minimum wage for women and minors. The resolution was passed by the legislature March 9, 1933, the same day as the minimum wage law, Chapter 38, Laws

of Utah, 1933, was passed by the legislature. The amendment in question was subsequently submitted to the electors and ratified by a majority vote. Plaintiffs in the case contested the validity of the ratification, while the state argued that the amendment was retroactive. The Court said:

> "We need not pass upon the question because the amendment if validly adopted and ratified would not be retroactive. The minimum wage law, if valid, must have been within the legislative power to enact when it was adopted in March, 1933, *that is under the Constitution without the amendment*. . . ." (Emphasis supplied.)

While the Court went on to find that the legislature had the power to enact legislation relating to the establishment of minimum wages, the implication remains clear that had it not such power, the minimum wage law would have been void.

The language of the amendment is pertinent. Substitute S.J.R. 5, Laws of Utah 1963, p. 670 provides:

> ". . . Tangible personal property present in Utah on January 1, m., which is held for sale or processing and which is shipped to final destination outside this State within twelve months may be deemed by law to have acquired no situs in Utah for the purposes of ad valorem property taxation and may be exempted by law from such taxation, whether manufactured, processed or produced or otherwise originating within or without the state. . . ."

Clearly, there is no hint of ratification, nor is there express mention of Section 59-2-14, U.C.A. Without

these there is no ratification sufficient to validate Section 59-2-14, U.C.A.

It is the opinion of the tax commission that Substitute Senate Bill 27 was void at the time of its enactment and even if the amendment is adopted will continue to be void.

CONCLUSION

Substitute Senate Bill 27, now codified as Section 59-2-14, et seq., U.C.A. 1953, was void when passed, is now void, and will remain void regardless of what action the electorate may take this fall in relation to the proposed amendment to the constitution which will be placed before it.

Since the statute is void, any rules and regulations purporting to implement the same would be void and of no effect, and their promulgation a futile and meaningless gesture.

We, therefore, respectfully urge that the petition of the Foulger Equipment Company for an extraordinary writ in the nature of mandamus be denied.

Respectfully submitted,

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